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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 186

DAVID H. PRICE, ROSALIE PRICE,
and HENRY S. PRICE,
PETITIONERS,

v.

ESTHER PRICE,
RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1213

DAVID H. PRICE, ROSALIE PRICE,
and HENRY S. PRICE,
PETITIONERS,

v.

ESTHER PRICE,
RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statutory Provisions

Mass. Gen. Laws, c. 211, sec. 10. *Frivolous exceptions or appeals; costs.* If, upon the hearing of an appeal or exceptions in any proceeding, it appears that the appeal or exceptions are frivolous, immaterial or intended for delay, the court may, either upon motion of a party or of its own motion, award against the appellant or excepting party double costs from the time when the appeal was taken or the exceptions were allowed, and also interest from the same time at the rate of twelve per cent a year on any

amount which has been found due for debt and damages, or which he has been ordered to pay, or for which judgment has been recovered against him, or may award any part of such additional costs and interest.

Question Presented

Where one party causes, by motion, a state trial court, sitting in Equity, to vacate a final decree and the other parties acquiesced in the motion by filing substantially the same motion and the trial court then enters a new final decree against the parties who filed the motion to vacate the first decree, after a hearing at which all parties were given full opportunity to be heard, and on appeal the Supreme Court of the State holds, *inter alia*, that the trial court had jurisdiction to vacate the first decree and after a hearing on the merits enters the second decree, have the parties who caused and acquiesced in the vacating of the first decree been deprived of life, liberty or property without due process of law by the entry of the second decree, even assuming, arguendo, prior state decisions appear to have held that generally a trial court sitting in equity has no jurisdiction to vacate a final decree?

Statement of the Case

Two of the petitioners, David H. and Rosalie Price, children of one Louis N. Price and legatees and devisees under his Will, brought suit against the petitioner, Henry Price,[1] the executor of the will, Pearl Clayman (another child) and Esther Price, Louis Price's widow, and the re-

[1] In the caption of the case in the Massachusetts Supreme Judicial Court, Henry Price was grouped with Esther Price and not with David and Rosalie Price. The caption on the petition is thus, somewhat misleading.

spondent. (R 1-4). Henry price accepted service of the Bill of Complaint. (R 4). The Bill sought to restrain Esther Price from prosecuting an action at law against Henry Price on a contract under which Esther Price agreed to forbear to contest the will of Louis Price in return for the payment of money in installments; the Bill further sought an accounting of the money already paid her (R 5, R. 46-47). Esther Price included in her answer a counterclaim praying that Henry be ordered to pay her the amount due under the agreement (R 24-25). Her answer and counterclaim was the duly served upon Henry Price and Pearl Clayman (R 27). Henry failed to appear and answer and an interlocutory decree taking the counterclaim for confessed was entered on November 27, 1962 (R 28). On December 19, 1962 the Court entered a final decree against Henry in favor of Esther granting her prayer under the counterclaim. The plaintiffs (David and Rosalie) duly filed an appeal, as did Henry Price. The Plaintiffs then moved to vacate the final decree on January 4, 1963. On the same day Henry Price also moved to vacate the final decree (R 35-36). The Court allowed Henry's motion (R 37). Further hearings were held at which Mr. Crane, representing David and Rosalie refused to present evidence or cross examine. Mr. Daniel Rollins, Esq., (counsel of record at the time for Henry Price) stated in open court that on the question of damages he had no evidence and did not dispute Esther's evidence (R. 50). The trial court found that the Price brothers and sisters are a close knit family and all members meet together weekly (R 53). After Esther had commenced her action at law, David, Rosalie and Henry Price met at Mr. Crane's offices and held a conference, as a result of which the bill of complaint was drawn up and Henry endorsed his acceptance of service (R 53). This suit was found to be a contrivance to deprive Esther of her rights, and the Court entered a second final decree granting Esther

the relief she sought in her counterclaim. (R 38). Appeals were duly taken and the Massachusetts Supreme Judicial Court affirmed, awarding double costs to Esther Price.

The Federal Question in the Courts Below

The so-called Federal question was raised as described in the petition. The question, however, was not raised at the first opportunity; the Federal question could have been raised at the trial level by filing an appeal to the trial court's action in vacating the first final decree. The petitioners did not do this. In fact, it was at their urging that the court vacated its first final decree. Therefore, petitioners' statement on page 6 of their petition that "they had no reason to anticipate a retroactive change of procedure" is simply not so. This court under its own decisions in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930), *Wilson* v. *Cook,* 327 U.S. 474, 480-482 (1945) and *Hulbert* v. *Chicago,* 202 U.S., 275, 280 (1906), has no jurisdiction to grant the petition even if, in its discretion, it wished to do so, for the petitioners did not raise this so-called Federal question at the earliest possible time.

Reasons for Denying the Writ

I. The Petitioners Were Not Denied a Full and Fair Hearing on the Merits.

The short answer to the petitioners' argument that they have been deprived of "a constitutional right of a hearing" because of a retroactive change in the state procedural law is that the Massachusetts Supreme Judicial Court made no such change. The petitioners have quoted and cited the leading case of *Thompson* v. *Goulding,* 87 Mass. 81 (1961) as standing for the proposition that once a trial judge has

entered a final decree he may not vacate it for want of jurisdiction (Petition p. 7). However, their quotation is not in context and the part deleted, interestingly enough, is the part which is applicable to the case at bar. It reads as follows:

> "There are however, exceptions to this rule. Cases do not come within it where some clerical errors, mistakes in computation or irregularities in making up the record have occurred, or where a formal decree has been made on default of a party through the negligence or mistake of his solicitor, *or by reason of want of notice to him of the pendency of the suit*". 87 Mass. at 82 (emphasis supplied).

The Court vacated its decree because no notice of the hearing had been given Henry Price (R 37). Furthermore, later cases have held that the general rule which the petitioners claim has been overruled applies only to final decrees entered after a hearing on the merits. *Donovan* v. *Danielson,* 263 Mass. 419, 161 N.E. 807 (1928). One basis of Henry's motion to vacate was that he had no opportunity to be heard on the merits. Thus at the trial level petitioners relied on the exception which they now claim had no prior existence in local law. Therefore, it is clear that the trial court followed well-established procedure throughout this litigation. If the ruling of the Supreme Judicial Court, caught the petitioners by surprise, it was not because the Supreme Judicial Court overruled prior law.

The second answer to the petitioners' contention is that they were given an opportunity to be heard at the hearing on which the second final decree was based (R 50). This case is thus clearly distinguishable from *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 and *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, "the voice of the cynic" to the

contrary notwithstanding. Petitioners recognize this dilemma but attempt to escape it by asserting (without any authority) that "had they acquiesced in the trial judge's assertion of jurisdiction, they might well be found to have waived their appeal. . . ." (petition p. 6). There was no danger of waiver had they made known their objection to the court's holding further hearings and appealed from the court's action in ordering further hearing. Had that been done, petitioners' rights (if any) would have been protected for appeal, and they could have proceeded just as any litigant does after having been aggrieved by an interlocutory order. This procedure was clearly set forth by the Massachusetts Supreme Judicial Court in *Anti* v. *Boston Elevated Ry.*, 247 Mass. 1, 141 N.E. 598 (1923). In *Anti* the trial judge allowed the defendant's motion for a new trial and the Plaintiff excepted. A new trial resulted in a verdict for the defendant. The Supreme Judicial Court held that the plaintiffs by participating in the second trial waived no rights. "The proper course was for each plaintiff to file exceptions to the order setting aside the verdict." 247 Mass. at 3. Furthermore, if the trial court lost jurisdiction over the case after the entry of the first final decree, the issue of jurisdiction could have been raised at any time in the proceedings below. *A. Sandler Co.* v. *Portland Shoe Mfg. Co.*, 291 Mass. 326, 197 N. E. 1 (1935), for a party by "consent or waiver" cannot confer jurisdiction upon a court. *Holt* v. *Holt*, 253 Mass. 411, 149 N.E. 40 (1925). Therefore, the petitioners would have lost nothing by taking the opportunity afforded them to fully participate in the hearings, and their choice not to do so led to consequences of their own making. If they lost any rights at all, it was their own action and not any action by the Massachusetts courts which caused the loss, and consequently they were not deprived of anything unconstitutionally.

II. The Case at Bar Presents No Issues of Any Importance

The trial court found, in effect, that this case originated as a collusive suit brought by the petitioners (R 53). The Supreme Judicial Court allowed double costs to the Respondent. Double costs may be allowed under Massachusetts law only when the Supreme Judicial Court finds that the appeal is "frivolous," "immaterial" and "intended for delay." Mass. Gen. Laws (Ter. Ed.) c. 211, sec. 10 (1958). This petition is but another attempt to delay this widow in obtaining what is rightfully hers.

The petitioners suggest that this case raises important questions of federalism because it allegedly shows that state judges may overlook the impact of their decisions on Constitutional rights. Even a cursory reading of the opinion below and a passing consideration of the interpretation of that opinion urged upon the Court by Petitioners reveals that the court below in no respect acted to deprive anyone of any constitutionally protected rights. The opinion below is not an example of a case where a state has impinged upon constitutional rights with respect to its delineating and defining procedure; it merely reiterates a purely well-established local rule that a court of equity may under certain circumstances vacate its final decrees and that aggrieved litigants must comply with well-established rules of procedure. This case is of no significance to anyone, except the parties. The petition is merely the most recent of a long series of legal maneuvers intended solely for delay.

Conclusion

The petitioners did not raise their supposed Federal questions until the last possible moment in the State Courts. The Massachusetts Superior Court and the Supreme Judicial Court did nothing but reiterate well-established, accessible rules of equity procedure. Esther Price has been delayed too long by the petitioners in securing her rights, first by a collusive suit and then by a frivolous appeal. She prays this court that the petition be denied forthwith.

Respectfully submitted,

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